No. 182.

In the Supreme Court of the United States

October Term, 1948.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, *Appellants*,

vs.

EMPIRE STORAGE AND ICE COMPANY, a Corporation, *Appellee*.

BRIEF FOR APPELLANTS.

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INDEX.

PAGE

Cases Cited.

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Opinion Below.

The opinion of the Supreme Court of the State of Missouri (R. 59-65) is reported in 210 S. W. (2d) (Advance Sheets, May 18, 1948) 55. It is not yet officially reported.

Jurisdiction.

The federal questions here presented were properly raised and preserved and were passed upon by the courts below (R. 6-7, 8, 51; 60). The judgment of the Supreme Court of Missouri was entered on March 8, 1948 (R. 78). Appellants' motion for rehearing was overruled on April 12, 1948 (R. 65).

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended, 28 U. S. C. Section 344(a). On October 11, 1948, this Court noted probable jurisdiction (R. 77).

Question Presented.

The question presented is whether a state court may, pursuant to its construction of a state statute prohibiting conspiracies and combinations in restraint of trade, enjoin a labor organization composed of ice truck drivers from seeking to unionize nonunion peddlers by peacefully picketing the premises of an ice company with placards truthfully stating that the company sells ice to nonunion peddlers.

Statute Involved.

The pertinent provision of the Missouri statutes (Mo Rev. Stat., Vol. 18, p. 516, Section 8301) is as follows:

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing brought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

STATEMENT.

This case arises out of a controversy over the unionization of ice truck drivers, or peddlers, in Kansas City, Missouri, and the wages to be paid their helpers. The dispute relates to the conditions under which ice is sold and delivered to retailers. The issue is whether ice truck drivers who are members of the union may constitutionally be prohibited from publicizing their side of the dispute by peaceful picketing at the premises of a producer-wholesaler who sells ice to nonunion drivers.

About eighty percent of the approximately two hundred ice peddlers in Kansas City, Missouri, are members of Ice and Coal Drivers and Handlers Local Union No. 953, affiliated with American Federation of Labor (R. 59, 33-35). The union admits to membership all truck drivers delivering and selling ice and coal, whether or not the drivers own their own trucks (R. 42). Peddlers' helpers, who are also members of the union, are protected by a union wage scale pursuant to which helpers are paid a minimum of four dollars a day (R. 59; 35). Some, at least, of the peddlers who are not members of the union pay their helpers "much less" than the minimum paid by union peddlers (R. 35).

In an effort to preserve the working conditions and wage standards it had established, the union solicited nonmember peddlers to join the union (R. 40; 35). When such solicitation proved unsuccessful the union resorted to the traditional, peaceful methods available to it for self-protection against the depressing wage competition of the nonunion peddlers. The union persuaded all but one ice producing company which furnished ice to its members to agree not to furnish ice to peddlers who refused to join the union and pay the union wage scale (R. 59-60; 34, 44). The remaining producer-wholesaler,

Empire Storage and Ice Company refused the union's request that it refrain from furnishing ice to nonunion peddlers (R. 60; 13-14, 15-16, 39-40).

The Company's president, W. Ralph Wilkerson, advised the union representative that his refusal was based upon the fact that, "I was hired as a manager of that Company to retain business and not drive it away. It would be inconsistent for the manager of the Company to do that" (R. 14).

Therefore, to publicize the dispute, with the object of persuading the nonunion drivers to join the union (R. 28, 35-36), the union placed a picket approximately 15 to 25 feet in front of the main entrance to the Company's plant. The picket carried a sign reading "Empire Cold Storage Company sells ice to nonunion peddlers" (R. 28-29, 35-36). There was no violence or threat of violence accompanying the picketing (R. 60).

Observing the picketing, members of the Union, drivers sympathetic with the union's cause, refused to cross the picket line and patronize the Company with the result that both ice and storage, the Company's business, fell off approximately eighty-five percent (R. 60; 17-18, 19, 21, 24, 31).

To prevent this interference with its business, the Company, on July 8, 1946, filed in the Circuit Court of Jackson County, Missouri, a petition for injunction (R. 1-4). The Company named Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry and A. J. Jenkins, individually and as representatives of all other members of the Union, as defendants in the action. The defendants, except Jenkins, were designated only as "members of the Ice and Coal Drivers and Handlers Local Union No. 953" who were not employed by the

Company. Jenkins was identified as "acting president and business agent of said association" (R. 1). The complaint alleged that the defendants placed pickets "about and around the premises operated by plaintiff in its warehouse, cold storage and ice business in Kansas City" (R. 2); that the purpose of the picketing was to prevent plaintiff "from servicing its customers in its warehouse, cold storage and ice business * * * and forcing its customers to patronize rival business, industries and enterprises" (R. 3); that the defendants in combining to picket for this purpose "entered into an unlawful agreement, combination and understanding in restraint of trade in the rendition of warehouse cold storage and ice service to the general public," and that in consequence of the picketing plaintiff and the public suffered irreparable damage (R. 3). The complaint further alleged that "there is no labor dispute existing between the plaintiff and its employees and there is no labor dispute existing between the defendants, and each of them and this plaintiff" (R. 2). The complaint prayed that a temporary injunction be issued pending trial, and thereafter that a permanent injunction issue restraining and enjoining the defendants, and each of them, from placing pickets or picketing around and about the buildings of plaintiff used in the cold storage warehouse and ice business in Kansas City, Missouri" (R. 4).

On the same day, the court issued a temporary injunction in the language requested in the complaint (R. 4-5). On July 19, 1946, defendants filed a motion to dissolve the temporary injunction on the ground that the complaint failed to state a cause of action and that the restraining order violated the rights of defendants under, *inter alia*, the First and Fourteenth Amendments to the Constitution of the United States (R. 7-8). On July 19,

1946, defendants also filed an answer to the complaint alleging, among other things, that "there is a labor dispute existing between the said defendants and the plaintiff, in that plaintiff is selling ice to peddlers who are not members of the said defendants' union," and that their right peacefully to picket plaintiff's premises is protected by the First and Fourteenth Amendments (R. 6-7).

On July 29, 1946, the court entered an order overruling defendants' motion to dissolve the temporary injunction and fixing the date of August 8, 1946, for further hearing on the temporary injunction (R. 8). On August 8, 1946, the parties agreed that the hearing should be on the question whether a permanent injunction should issue and the court approved this agreement (R. 9). At the conclusion of the hearing on August 8, the court entered its judgment, finding that the defendants "engaged in an agreement, combination and understanding to picket plaintiff's warehouse, cold storage and ice plant * * * and thereby to prevent ingress and egress thereto and therefrom and thereby interfere with the relationship between plaintiff and its customers and in unlawful restraint of trade of plaintiff, and for the further purpose of alienating and driving away plaintiff's customers" (R. 49). The court further found that "there does not here exist any labor dispute within the meaning of the law * * * and that there is no labor dispute whatever involved. That said conspiracy is for an unlawful purpose, and that picketing used to carry out said purpose is also unlawful" (R. 50). The court thereupon entered a permanent injunction enjoining "the named defendants and all other members of the Ice and Coal Drivers and Handlers Local Union No. 953 * * * from placing pickets or picketing, around and about the buildings of plaintiff

described above, and used by plaintiff in the cold storage, warehouse and ice business in Kansas City, Missouri'" (R. 50-51).

From this judgment the defendants appealed to the Supreme Court of Missouri, urging the constitutional objections raised below (R. 52-53, 54-55, 56, 63). On March 8, 1948, the Supreme Court of Missouri entered its opinion and judgment of affirmation (R. 58-65).

In its opinion the court held that despite the fact that the picketing was wholly peaceful (R. 60), it was unlawful because its purpose "to compel plaintiff to stop selling ice to nonunion peddlers" was in restraint of trade and therefore violated Section 8301 of the Missouri statutes (R. 60-62). The court held that when a labor union "abandons its legitimate sphere of collective bargaining and other properly related dealings with its employers and seeks to dictate the terms under which an establishment will be either permitted or denied local transportation service," the union commits an unlawful act despite the fact that, as here, the denial of transportation service results solely from peaceful picketing and the voluntary refusal of drivers to cross the picket line (R. 62). The court further held that the dispute between plaintiff and defendants over the sale of ice to nonunion peddlers is "no labor dispute as that term has been construed by court decisions" (R. 62).

In construing Section 8301 as applicable to the picketing here engaged in the court stated that that section renders unlawful any "combination for the purpose of refusing to sell to a certain person or persons" (R. 62). The court stated that the agreements between the union and ice companies in Kansas City, other than plaintiff, pursuant to which such companies agreed not to sell ice to nonunion peddlers were themselves violative of

this Act (*ibid*), and that the attempt by picketing to induce plaintiff to enter into such an agreement was an attempt to induce plaintiff to commit an illegal act (*ibid*). Concluding that picketing for the purpose of attempting to prevent the sale of ice to nonunion peddlers was *per se* violative of Section 8301, and that an injunction against such picketing did not violate the First and Fourteenth Amendments, the court affirmed the judgment below (R. 63-65).

On April 12, 1948, the Supreme Court of Missouri denied appellants' motion for rehearing (R. 65), and on October 11, 1948, this Court noted probable jurisdiction of the appeal (R. 77).

SPECIFICATIONS OF ERRORS TO BE URGED.

The court below erred:

1. In holding that when a labor organization composed in part of ice peddlers is seeking to induce nonmembers to join the union, a dispute over the sale of ice to nonmembers is not, for constitutional purposes, a labor dispute.

2. In holding that a union of ice peddlers may be enjoined from seeking to protect itself against substandard, nonunion competition by obtaining agreements from employers that they will not sell ice to nonmembers of the union, because such agreements lessen the business of nonunion peddlers.

3. In holding that because peaceful picketing for the purpose of inducing an employer to refrain from selling goods to nonunionists results in lessening of the employer's business the picketing may constitutionally be enjoined.

4. In holding that the peaceful, truthful publication by a labor organization through picketing of the fact that a business enterprise sells goods to nonmembers of the union is not protected by the First and Fourteenth Amendments.

SUMMARY OF ARGUMENT.

I.

Peaceful picketing of an ice company for the purpose of inducing the company to cease selling ice to nonunion peddlers constitutes an exercise of the right to free speech. By selling ice to peddlers who refused to abide by working conditions established by the union for its members the company threatens the legitimate interests of all union members. The dispute between the Company and the union over sale of ice to nonunion peddlers is a "labor dispute" as that term has been defined for constitutional purposes by this Court. No state can constitutionally prohibit union members from publicizing their side of such a dispute near the premises of the ice company either by adopting a distorted view of "labor disputes" or by refusing to recognize the legitimacy of the union's grievance.

Peaceful picketing in labor disputes is indispensable to the exercise by workers and the public of the right to participate in the resolution of issues of vital economic importance to them. The fact that peaceful picketing may result in such active participation by union members and the public, far from constituting a reason for prohibiting picketing, is the very reason for its constitutional protection.

Neither economic injury to the business picketed, nor injury to the economic interests of nonunion workers, which may result from peaceful picketing by union members seeking to advance their legitimate economic interests may constitute justification for a prohibition of picketing.

II.

A state may not constitutionally apply common law concepts of restraint of trade in such fashion as to illegalize

the concerted efforts of workingmen to protect their legitimate economic interests in satisfactory wages, hours and working conditions. Peaceful picketing for such purposes is protected by the Constitution even though called a "conspiracy" or "tort." Restraint of trade concepts may not be utilized to narrow the constitutional boundary of labor disputes within which the right to peaceful picketing is protected by the First and Fourteenth Amendments.

A state may not, to protect the economic interests of nonunion peddlers, make it unlawful for an employer to acquiesce in union demands that he refrain from supplying goods to nonunion peddlers, nor may it prohibit peaceful picketing aimed at inducing an employer so to acquiesce. Neither economic injury resulting to employers from such picketing, nor economic injury to nonunion peddlers which results from refusal of employers to supply goods to them consitutes a substantive evil of such magnitude as to mark a limit to the right of free speech.

ARGUMENT.

I.

Peaceful picketing of a business which threatens the economic interests and wage standards of union members by sustaining their nonunion competitors is an exercise of the right to free speech protected by the First and Fourteenth Amendments against state abridgment.

This case presents another phase of the now familiar controversy over the unionization of "peddlers" or "vendors;" which, as it affected the milk business, this Court examined in *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, and *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287; and, as it affected the bakery products business, was examined in *Bakery & Pastry Drivers and Helpers* v. *Wohl*, 315 U. S. 769. Here, as in those cases, the legitimate grievances of the unionized peddlers, ice truck drivers and helpers, stem from the fact that nonunion peddlers undermine the standards of wages and working conditions which the union has achieved for its members.

Here, as in all of those cases, the union first in good faith solicited the nonunion peddlers to join the union. Here, as in those cases, the refusal of the nonmember peddlers to join forced the union, in self-defense, to seek to enlist the support of those whose patronage sustained the nonunion system. Here, as in the *Lake Valley* and *Wohl* cases, and unlike *Meadowmoor*, speech alone, uncoupled with violence, was resorted to. *As in the Wohl case*, 315 U. S. at p. 775:

> "The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended by violence, force or coercion, or conduct

otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing."

The state found nothing unlawful in the action of the union members in soliciting the nonunion peddlers to join the union. What was found unlawful was the action taken by them against the ice company which distributes ice through nonunion peddlers. The state has here held that the union members may not, "in order to compel observance of established standards," *Meadowmoor case, supra*, 312 U. S. 287, 291, seek by peaceful picketing to enlist the support of an ice company which uses nonunion peddlers as outlets for its products. The sole object of the union in seeking to enlist the support of the ice company, like the sole object of the union in the *Lake Valley, Meadowmoor* and *Wohl* cases, was to induce nonunion peddlers to join the union and observe established working conditions.

In insulating appellee ice company from peaceful picketing the state has here done precisely what this Court held in the *Meadowmoor* and *Wohl* cases, that a state could not constitutionally do. In the *Meadowmoor* case the Court affirmed unequivocally the constitutional right of the union to take action in the form of peaceful picketing against dairies supplying goods to nonunion vendors (312 U. S. 287, 291, 297). It is true that in that case the action taken by the union against the dairies involved picketing at the retail stores which sold to the public the milk processed by the dairies, whereas in this case the union did not go so far as to picket the customers of the nonunion ice peddlers. But most assuredly it cannot seriously be claimed that although the union had a right to picket the customers of the vendors in the *Meadowmoor* case, in order to bring pressure on the dairy which supplied milk to the vendors,

it nevertheless did not have a right to bring pressure on the dairies directly by picketing at their own premises. Yet, incredibly, it is on this ground, and on this ground alone, that the court below attempted to distinguish the *Meadowmoor* case (R. 64).

The facts of the *Wohl* case leave no room even for this insubstantial distinction. For in the *Wohl* case the union picketed baking companies which supplied bread to nonunion peddlers precisely as the union here picketed the ice company which sold ice to nonunion peddlers. In fact, in the *Wohl* case, this was the only picketing ever actually engaged in. The state court, as did the court below here, enjoined the union "from picketing the places of business of manufacturing bakers who sell to the" nonunion peddlers "because of the fact that said manufacturing bakers sell" to such peddlers (315 U. S. at 773) (Cf. 315 U. S. 737, note 5), and this Court held that this injunction was an invasion of rights guaranteed the union by the Fourteenth Amendment. It is mockery, we submit, to say as did the court below, that the *Wohl* case is not controlling because "no baking companies were parties to that case" (R. 63), particularly when, in the *Meadowmoor* case, the plaintiff was the supplying dairy against which the picketing was ultimately directed.

The holdings of the court below that "there is no labor dispute as that term has been construed by court decisions between plaintiff and defendants," and that the union here abandoned "its legitimate sphere" by picketing the ice company (R. 62), likewise cannot be reconciled with decisions of this Court. In the *Lake Valley* case this Court specifically held that a dispute between a union of milk truck drivers on one side and dairies on the other, over the question whether the dairies would supply milk to nonunion drivers was a "labor dispute." "To say," noted the court, that this "was an issue unrelated to labor's efforts to im-

prove working conditions, is to shut one's eyes to the everyday elements of industrial strife." 311 U. S. 91, 99. The same issue, between the same parties, was held in the *Meadowmoor* case to give rise to a labor dispute. The court emphasized that but for the violence present in that case peaceful picketing for the purpose of interferring with the dairies' business could not constitutionally have been enjoined.

And in the Wohl case, where the New York courts applied the same distorted definition of "labor disputes" which the Supreme Court of Missouri adopted here, this Court made it clear that whatever object such a definition might serve for purposes of state law, it could not affect the constitutional right to engage in peaceful picketing which had as its ultimate object inducing nonunion peddlers to conform to union standards. "One need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter," 315 U. S. at p. 774. The grievance held by the union against the manufacturing bakers in the *Wohl* case was the very same grievance held by the union in this case against appellee. They supplied goods to nonunion vendors who threatened the union's established standards. The picketing enjoined by the New York Courts was picketing for the purpose of inducing them to cease doing so. This, the Court held, was a "labor matter," and the union could not constitutionally be prevented from peacefully publicizing its grievance at the premises of the supplier. That is all appellants did here. A picket walked back and forth before appellee's premises carrying a sign bearing the legend of the union's grievance, i. e., that appellee sold ice to nonunion vendors. If this activity constituted publication of the facts of a labor dispute in the *Wohl* case, we are at a loss to understand how it can be said in this case to involve no "labor dispute."

Only last March this Court again observed that "sale by a merchant of nonunion commodities is, no doubt, a traditional source of labor disputes." *Bakery Sales Drivers Union* v. *Wagshal*, 333 U. S. 437, 444. In the light of this Court's recognition in the *Lake Valley*, *Meadowmoor* and *Wohl* cases, that sale by a wholesale merchant of commodities to a nonunion retail vendor is also a traditional source of labor disputes it is clear that no valid distinction between the two situations can be drawn. Yet the court below did draw a distinction. It emphasized that because the employees employed in appellee's ice producing and storage business are union members "the ice which it sells is a union product, not a nonunion product" (R. 59). And it purported to distinguish the *Lake Valley* and *Meadowmoor* cases on the ground that the picketing was confined to the place of business of the peddler's customers—which, presumably in the court's view, was justified as a protest against sale by retail stores of nonunion goods. Why labor unions may have a legitimate grievance against a retailer who purchases goods from nonunion vendors but may not have a legitimate grievance against a wholesaler who supplies these goods to them, the court did not undertake to explain. Of course, if a state could ban peaceful picketing on the theory that sale of goods to nonunion peddlers does not give rise to a legitimate union grievance it could equally ban peaceful picketing on the theory that sale by a retailer of nonunion commodities does not give rise to a legitimate union grievance. The cases decided by this Court hold that a state may do neither.

That the court below attempted to distinguish the decisions of this Court upon such grounds as these demonstrates, we believe, that it misconceived the entire constitutional philosophy upon which those cases rest. To that philosophy, and its applicability to the facts of this case we now turn.

A. Publication of the facts of a labor dispute serves the objectives of the First Amendment by enabling those engaged in the industry and the public to play a part in the decision of issues of critical economic importance.

In *Thornhill* v. *Alabama*, 310 U. S. 88, 103, 104, this Court, explaining its invalidation of a state anti-picketing statute, stated:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. * * * It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend upon these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. * * * Labor relations are not matters of mere local or private concern. Free discussion concerning conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem."

Publication of the facts of a labor dispute is thus sheltered by the First Amendment not merely because publication is an end in itself. It is protected because publication is indispensable if members of the industry in which the dispute arises and members of the public generally are to be able to exercise their fundamental liberties to shape their economic destiny. It is the legitimate interest of those

engaged in an industry in "satisfactory hours and wages and working conditions * * * and a bargaining position which makes these possible" which lies at the heart of the constitutional protection for picketing in labor disputes. That the public too has an interest which warrants placing before it the facts of a labor dispute so that it may, by granting or withholding its patronage, play a part in the resolution of the dispute between the contestants is the corollary holding of Thornhill's case.

Suppliers and customers of nonunion peddlers, and those who patronize such suppliers and customers, sustain the nonunionists in their refusal to abide by union wage standards. All have a vital interest in whether substandard wage practices should be permitted to continue. By continuing their patronage they sustain the nonunionists in their dispute with the union. By withdrawing it they assist the union to eliminate the threat to the wage standards of all engaged in the trade or occupation. If information concerning the dispute may not be conveyed to them they have no opportunity to determine whether by their patronage they are assisting in the perpetration of conditions of employment of which they may disapprove. That such information may not constitutionally be denied to them; that they may not be denied the opportunity to decide whether to continue or to cease patronizing and sustaining nonunion working conditions, was re-emphasized in the *Wohl* case. Explaining why the ban on picketing of the manufacturing bakers and the retailers could under no circumstances be permitted to stand, the court said (315 U. S. at p. 775):

> "(The nonunion peddlers') mobility and their insulation from the public as middlemen made it practically impossible for (the union drivers) to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated."

Since the purpose of protecting publication of the facts of a labor dispute is to enable members of the industry and the public to play a part in resolution of the dispute in order to protect their own vital interests, consistently with Thornhill's case, no state could be permitted to withdraw disputes affecting labor's efforts to improve working conditions from the area in which peaceful picketing could constitutionally be used. This is the holding of *American Federation of Labor* v. *Swing*, 312 U. S. 321. In that case

> "A union engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed. To enjoin this interference with his business, and with the freedom of his workers not to join a union, Swing and his employees began the present suit" (312 U. S. at 323).

The Illinois courts sustained the suit on the theory that since there was no labor dispute between Swing and his employees, the union had no legitimate interest in picketing Swing's place of business. Illinois law was declared to be "that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him" (312 U. S. at 325). This Court held the Illinois law, as so applied, unconstitutional. It said (312 U. S. at p. 326):

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limit of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small

as to contain only an employer and those directly employed by him. The economic interdependence of all engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Central Trades Council* (257 U. S. 184). The right of free communication cannot therefore be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute deemed by them to be relevant to their interests can no more be barred by concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case."

The dispute involved in the *Swing* case was a dispute over unionization. Illinois had declared, in effect, that in such a dispute it was unlawful for union members to attempt to gain their objective by urging the public to refrain from patronizing the nonunion enterprise. Illinois thus attempted to protect the economic interests of the nonunion employer and nonunion employees against the consequences of action taken by union members and the public for the purpose of inducing the employer and his employees to join the union. Citing the *Tri-Cities* case this Court held that the interests of employers in eliminating nonunion competition in the industry was so vital, that under the Constitution they could not be precluded from pursuing that objective by the methods there used.

In the *Tri-Cities* case, as in *Holden* v. *Hardy*, 169 U. S. 366, 397, this Court recognized that effective competition between employees and employers for shares of the products of industry is possible only through united action by employees. "Union was essential to give laborers opportunity to deal on equality with their employer" (257 U. S. at 209). Because it was essential, and because no state could consistently with the Thirteenth Amendment, erect

barriers to prevent employees from obtaining equality of bargaining power with employers, this Court recognized the right of employees to form labor unions, embracing all engaged in a single trade or industry, which, by eliminating the competition of nonunion employees, could attain for employees in the industry, vis-a-vis employers, that equality of bargaining power which distinguishes the status of a worker in a free society.

The *Tri-Cities* case also recognized that the concerted refusal of workers in an industry to work or to deal with an employer for the purpose of inducing him to grant improved wages, hours or working conditions or to refrain from conduct which would weaken their bargaining position was fundamental in a free society. Describing such action the Court said:

> "They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth * * *. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital."

It is universally recognized that union standards cannot be maintained if some employees in the industry are permitted to work at lower standards. (*Apex Hosiery Co. v. Leader*, 310 U. S. 469, 503). It is the doctrine of the *Tri-Cities* case as applied in the *Swing* case, that no state can prevent labor unions from seeking to preserve and protect the standards they have achieved by picketing those who engage in and foster substandard wage competition.

Where a state prohibits such picketing it deprives union members and the public of power to use their influence to improve wages, hours, working conditions and the bargaining power of employees, a denial which negates the principles not alone of the First Amendment but of the Thirteenth and Fourteenth as well.

Ignoring this fact, Shasta County, California, imposed the ban on peaceful picketing which was invalidated in *Carlson's* case, 310 U. S. 106, 112. The court there said:

> "It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives; disinterested persons (who might be hired to carry signs) appear to be a possible, but unlikely, exception. In brief, the ordinance * * * proscribes the carrying of signs only if by persons directly interested who approach the vicinity of a labor dispute to convey information about a dispute."

The opportunity of the public and of union members to be informed of the facts of a labor dispute so that they may take such action, far from being an excuse for invalidating picketing, is thus one of the basic justifications for its constitutional protection.

B. Neither ice companies which distribute ice through nonunion peddlers, nor such peddlers themselves, may constitutionally be exempted from the consequences of peaceful picketing by union members aimed at inducing adherence to union working standards.

In this case, as in the *Swing* case, the state had attempted to draw "the circle of economic competition

between employers and workers so small as to contain only an employer and those directly employed by him." Missouri, like Illinois, has banned peaceful picketing at the premises of an employer who supports nonunion workers in their competition with union workers. Missouri, like Illinois, has imposed the ban as a result of ignoring the fundamental economic interests of union workers and the public in the maintenance of fair standards of wages and working conditions. Missouri, like Illinois, has imposed the ban to protect the business interests of the employer and those of the nonunion workers against the consequences of peaceful picketing. If the right to free communication is not to be mutilated that ban cannot be permitted to stand.

It is true, of course, as this Court has always recognized, that peaceful picketing in dispute over unionization results in injury to the business of the enterprise picketed, and that to avoid such injury the business involved may comply with the union's demands and thereby injure the economic interests of the nonunion employee. But, because the resultant injury to the nonunion employee is not an end in itself, but merely a means to the union's legitimate end of preserving its standards of wages and working conditions, this Court has refused to permit "concern for the economic interests against which (unionists) are seeking to enlist public opinion" to serve as justification for prohibiting peaceful picketing. *Swing* case, *supra*. As noted above, the economic interests which the state sought to shelter in the *Swing* case, were precisely those which Missouri seeks to shelter here, i. e., those of the employer and the nonunion workers.

In *Thornhill's* case, 310 U. S. 88, 104, the court pointed out that picketing

> "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests * * *. The danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

In the *Wohl* case, again as here, the state was seeking to protect the economic interests of nonunion peddlers against the consequences of picketing their suppliers and customers. Of course, if the picketing was successful the suppliers and customers would cease doing business with the nonunion peddlers unless and until they agreed to observe union standards of working conditions. The New York courts believed that the objective of the union—to induce the suppliers and customers to refrain from patronizing those peddlers who refused to hire an employee at nine dollars a day for one day a week—was not a legitimate goal of the union. This Court held, however, that whatever the state's views as to the legitimacy of economic standards which it sought to induce nonunion peddlers to accept and no matter what view the New York courts took of the "coercive" effect of the potential withdrawal of patronage from the peddlers by suppliers and customers as a result of the picketing, "We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which petitioners sought to exercise." 315 U. S. at 774-775. And, the Court took pains to point out that it was not the state's province to decide whether the grievances of the union mem-

bers were "legitimate" for despite the state's view that they were not, this Court described the grievances as "legitimate" (315 U. S. at 775).

In sum, the cases hold that the interests of union members and the public in disputes over the extension of unionization and preservation of decent standards of wages and working conditions are of so fundamental a character that no state may prevent union members from seeking to advance their interests in such disputes through peaceful picketing. Limitations upon peaceful picketing based upon disregard of these fundamental legitimate interests of union members must automatically fall. And this is true whether a state, blinding itself to realities, chooses to regard as unrelated to labor's legitimate economic interests its efforts to induce employers to cease distributing goods through nonunion peddlers; or whether, disregarding the economic interdependence of all engaged in the same industry, it refuses to recognize that such an employer is the union's adversary in a labor dispute.[1] Moreover, no state can prohibit peaceful picketing because of its economic consequences to the picketed enterprise or its nonunion patrons or employees.

The opinion of the court below is utterly incompatible with these holdings. To say, as did the court below (R. 62), that the dispute between appellants and appellee ice company over the sale of ice to nonunion peddlers is not a "labor dispute" is to fly in the face of the holdings in the *Lake Valley*, *Meadowmoor* and *Wohl* cases. To confine the definition of "labor disputes"[2] as did the court below (R. 62), to disputes between an employer and his own employees is to disregard the economic interdependence

[1] Compare with the *Lake Valley*, *Meadowmoor*, *Swing* and *Wohl* cases, *supra*, the statement in *Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, 810; where Plaster, a contractor who employed nonunion carpenters, was described as the "real adversary" of the carpenter's union.

of all engaged in the same industry as flagrantly as did Illinois in the *Swing* case. To say, as did that court, that in seeking to induce appellee to stop selling ice to nonunion peddlers the union has abandoned its "legitimate sphere of collective bargaining and other properly related dealings with its employers" is to ignore the fact that this very conduct was held to be legitimate union activity in the *Lake Valley*, *Meadowmoor* and *Wohl* cases. To hold, as did the court below (R. 60, 62), that the picketing was unlawful because it interfered with appellee's business is to ignore the holdings of this Court in the *Thornhill*, *Carlson*, *Swing* and *Meadowmoor* cases.[2]

These are the findings, each of them fallacious, upon which the court below predicated its conclusion that the Missouri anti-trust statute could constitutionally be applied to the picketing in this case; that the Union's "grievance" against appellee resulting from its continued sale of ice to nonunion peddlers could be characterized as "unlawful," and that the union could by law be prevented from obtaining agreements with employers that they will not sell ice to peddlers who refuse to abide by union standards (R. 62-63).

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[2]To the extent that the court below relied upon the fact that not only appellee's ice business but its storage business, which was conducted on the same premises, was injured as a result of the picketing and consequent refusal of drivers to patronize appellee's business, the court ignored the holding of the *Wohl* case. There, where the union proposed to picket the retail stores which sold bread delivered by nonunion peddlers, the effect of the picketing if successful, would clearly have been to deprive the stores of the patronage of consumers sympathetic to the union not only with respect to the bread but also all other items sold by the stores. The *Wohl* case holds as Mr. Justice Reed commented in his dissenting opinion in the *Ritter* case, 315 U. S. at 737-738, that although "the selling of baked products, distributed by the peddlers is a minor part of the grocery business" a state may not on that account shield groceries which purchase bread from nonunion peddlers from peaceful picketing. Moreover, the economic consequences of the picketing in this case flow from the conduct of truck drivers, employees who are engaged in the very trade involved in the dispute. They, if anyone, have a right to refuse to patronize their adversaries in the dispute, and certainly the consequences of their refusal to patronize cannot, consistently with the cases discussed above, be deemed an excuse for prohibiting their fellow workers from advising them of the dispute.

Since it is clear that the picketing engaged in by appellants in this case was an exercise of the right to free speech guaranteed by the First Amendment which could not be enjoined because of either the state's "notion * * * regarding the wise limits of an injunction in an industrial dispute" (*Swing* case, *supra*), or because of its notion regarding the type of issues between employers and workers which are "labor disputes" (*Wohl* case, *supra*), or because of the state's desire to shield the economic interests of employers and workers from the economic consequences of peaceful picketing (*Swing*, *Wohl* and *Thornhill*, cases, *supra*), we turn to the sole remaining question, i. e., whether the state's notion that the object and effects of the picketing violate the policy of its anti-trust law serves to remove the picketing from the sphere of constitutional protection.

II.

Publication of the facts of a labor dispute by peaceful picketing may not constitutionally be enjoined merely because a state chooses to regard the consequences of such picketing as restraint of trade.

In this case the Missouri court held that the agreement of the union drivers to marshal public opinion against the practice of distributing ice through nonunion peddlers was illegal because it tended to injure appellee's business and that of the nonunion peddlers by discouraging trade. Violence aside, it was on this theory that Illinois attempted to illegalize picketing in the *Meadowmoor* case. There, but for the violence, this Court would clearly have held the injunction invalid. Undisputed by the majority was Mr. Justice Black's statement in his dissenting opinion (312 U. S. at 305) that:

> "Illinois cannot, without nullifying constitutional guarantees, make it illegal to marshal public opinion against these general business practices. An agreement so to marshal public opinion is protected by the Constitution even though called a 'common law' conspiracy or a 'common law' tort. Despite invidious names, it is still nothing more than an attempt to persuade people that they should look with favor upon one side of a public controversy."

The attempt of Missouri in this case to apply general "restraint of trade" concepts to the action of the union members in publicizing their dispute with the nonunion ice peddlers and the ice company which supports them is similarly an attempt to defeat the exercise of constitutional rights by applying to such exercise an "invidious name."

In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 503, this Court recognized that if common law or statutory policies against combinations in restraint of trade could be applied to the efforts of labor unions acting in concert to maintain and preserve decent standards of wages and working conditions the constitutional right of employees to self-organization for purposes of collective bargaining would be completely nullified. He pointed out that:

> "successful union activity, as for example consummation of a wage agreement with employers, may have some influence in price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from nonunion made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization."

In *United States* v. *Hutcheson*, 312 U. S. 219, where the Sherman Act was invoked as a basis for outlawing peaceful picketing which was an outgrowth of a jurisdictional dispute, the late Mr. Chief Justice Stone took occasion to point out (312 U. S. at 243) that:

> "the publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the employee not to patronize him is an exercise of the right of free speach guaranteed by the First Amendment which cannot be made unlawful by act of Congress."

We believe, therefore, that it is perfectly clear that a state may not apply either statutory or common law policies concerning restraint of trade to illegalize combinations among workingmen for the purpose of eliminating wage competition throughout a trade or industry. Nor may a state on any such grounds, prohibit workingmen from either obtaining agreements with employers pursuant to which wage competition is eliminated, or from seeking by the peaceful means of refusing to work, refusing to patronize and giving publicity to disputes to induce employers to enter into such agreements.

Virtually all peaceful picketing, as this Court recognized in the *Carlson* case, *supra*, results from combined action of individuals and has for its immediate object restraint of the business picketed. Moreover, virtually all picketing where disputes over unionization are involved has for its ultimate object elimination of competition over wages and working conditions. If either of these facts could serve as a valid basis for inhibition of picketing then peaceful picketing in the *Swing*, *Meadowmoor*, *Wohl*, *Thornhill*, *Carlson*, and other cases could constitutionally have been enjoined.

If a state could prohibit peaceful picketing merely because the state regards resultant interference with the business picketed as "restraint of trade" it could equally well enjoin peaceful picketing because it might regard the resultant interference as an unjustified interference with the property rights of the business enterprises.

Certainly the right to do business without unwarranted interference has value, and if, as the cases hold, a state may not protect the right to do business against peaceful publication of the facts of a labor dispute the reason lies not in the fact that one excuse for the prohibition may be less weighty than another, but rather in the fact that the Constitution prohibits the states from acting in the view that the interests of the unions which they seek to vindicate by picketing are not "legitimate" or do not justify the resultant interference.

The holding of this Court in *Carpenters and Joiners Union v. Ritter's Cafe*, 315 U. S. 722, lends additional weight to our view that when a state seeks to invoke statutory anti-trust or restraint of trade policies as a justification for prohibiting peaceful picketing the constitutional issue turns not on the question whether the consequences of the picketing restrain trade or tend to eliminate competition between union and nonunion men, but solely on whether, in this Court's view, the picketing is an outgrowth of a labor dispute in which the participants are economically concerned.

In that case Ritter contracted with Plaster, a nonunion contractor, for the erection of a building. Plaster employed nonunion carpenters and painters on the construction project. Carpeters and Joiners Union of America, aggrieved by this action, attempted to induce Ritter to require Plaster to employ union rather than nonunion carpenters by picketing a cafe owned by Ritter which was situated a mile and

a half from the construction project. Holding that the picketing of Ritter's Cafe constituted a violation of its anti-trust law, Texas enjoined the picketing. Although Texas had invoked its anti-trust statute, this Court laid no emphasis whatever on this fact. The issue, said the Court, is whether Texas may constitutionally insulate from the dispute arising over working conditions at the construction project "an establishment which industrially has no connection with the dispute," 315 U. S. 727. It was the absence of any industrial connection whatever between the restaurant business and the construction project—not the fact that Texas had relied upon its anti-trust statute rather than some other ground—which justified the restriction on picketing in that case. The court made this abundantly clear not only by reaffirmation in that case of the rule of the *Wohl* case (315 U. S. at 727), but also by its emphasis upon the fact that "Texas has not attempted to protect other business enterprises of the building contractor, Plaster, who is (the union's) real adversary" (*ibid*).

Here Missouri has attempted to accomplish through its anti-trust statute precisely what this Court said in the *Ritter* case Texas could not constitutionally accomplish through its anti-trust statute in the *Ritter* case. It has attempted to exempt from the economic pressure of picketing the very economic enterprise which sustains nonunion peddlers and which is therefore, like Plaster, appellants' "real adversary" in the dispute over working conditions in the ice delivery business. The issue then is solely whether Missouri can, on any theory, impose a limitation upon speech where there exists "an interdependence of economic interest of all engaged in the same industry," and this issue turns upon whether Missouri can constitutionally exempt from the area of a labor dispute the very enterprise whose business activities give rise to the dispute. We submit that it cannot.

We do not mean to suggest, of course, all activities of labor unions must as a matter of constitutional law be wholly exempt from either statutory or common law policies against restraint of trade. Where labor unions utilize their powers for the purpose of suppressing competition among business men in respect to other matters than wages, hours, or working conditions, or if unions are used as instrumentalities for fixing prices, such policies may, without constitutional objection, be invoked against them. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797; *United Brotherhood* v. *United States*, 330 U. S. 395. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 502, 504. What we do say is that a state may not, to serve its notions of public policy, exempt from the area of economic conflict such issues as satisfactory wages, hour, working conditions, and the bargaining power indispensable to their attainment, or treat the peaceful efforts of working men to attain these objectives as evils within the allowable area of state control. And, we say, that a state may not exempt a union's adversary in such a dispute over such issues from the consequences of peaceful picketing.

Nor do we mean to suggest that no issues between workers and employers which give rise to labor disputes may be made justiciable, and by substitution of process of justice, be removed from the area of economic conflict. As we read *Dorchy* v. *Kansas*, 272 U. S. 306, and *United States* v. *United Mine Workers*, 67 S. Ct. 677, they hold that a state may insist that clearly justiciable issues between organized workers and employers be decided through the judicial process provided by the state rather than through competition and the face of public opinion. The issues in those cases clearly lent themselves to judicial determination. Thus the issue in the *Dorchy* case was whether, under the law of the state, a workingman was entitled to back pay:

in the *Lewis* case, whether, under the law, a collective bargaining agreement had or had not expired. It could therefore be held an unlawful objective for the union to seek resolution of those issues by resort to the influence of public opinion rather than through the courts.

But the court below misreads these opinions if it assumes that they license a state court to outlaw resort to public opinion on issues of economic conflict in which organized workers have a substantial and legitimate concern merely by declaring that the objective which the workers seek to obtain is in its view unlawful, or that the employer cannot consistently with common law notions about restraint of trade comply with the union's demands. To permit state courts to outlaw peaceful picketing by such a technique would be to destroy the limitations upon state power which have been consistently maintained by this Court since Thornhill's case.

The court below has declared that it would be unlawful for appellee to agree with appellant to cease supplying ice to nonunion peddlers because it reads Section 8301 of the Missouri statutes as prohibiting any "combination for the purpose of refusing to sell to a certain person" and does not exempt such combinations where the refusal to sell is justified by the legitimate interests of the union members in preserving their standards of wages and working conditions, interests which could not be protected without such agreements.

The sole reason for so applying the statute in this case is to protect the economic interests of the nonunion peddlers in continuing to work for substandard wages and under substandard conditions, for only these interests could possibly be injured by the ice company's agreement not to sell to nonunion peddlers.

Because it holds that an agreement not to sell ice to nonunion peddlers would be illegal the court further held

that picketing to secure such an agreement is for an "unlawful objective" and may therefore be enjoined.

The reasoning of the court below is thus virtually identical with the reasoning of the New York Court in the *Wohl* case. There the court took the view that the refusal of bakers to supply goods to a nonunion peddler was illegal because it tended to "coerce" the peddler into hiring a helper. Picketing to induce bakers to refuse to supply bread to the peddler would therefore be for an "unlawful purpose" and on that theory enjoinable. This Court, after expressing doubt that such a rationale would even be offered by a state court as an excuse for limiting peaceful picketing in a case where the constitutional issue of free speech was raised and considered left no doubt that such reasoning could not warrant a ban. Neither the refusal of the baker to sell to the nonunion peddler, nor the inducement of others not to patronize bakers who persisted in such sales could constitutionally be deemed by the states to constitute "a substantial evil of such magnitude as to mark a limit to the right of free speech."

To hold that concern for the economic interests of the nonunion peddlers constitutes adequate justification for prohibiting suppliers from refusing to sell to them, or for prohibiting union members from picketing, reverses the doctrine of the *Swing* case that "concern for the economic interests against which they are seeking to enlist public opinion" cannot warrant prohibition of picketing.

If it could, a state would not have to go so far as to render it unlawful for an employer to refuse to supply goods to nonunionists in order to prohibit picketing for

the purpose of inducing him to do so. For the employer's interest in doing business with anyone he pleases is no less entitled to state protection than is the nonunionists' interest in being able to buy goods from particular sources. All picketing there could be barred on the theory that it constituted interference with the employer's business for the "unlawful purpose" of inducing him to run his business differently than he otherwise would. Cf. *Journeymen Tailors* v. *Miller*, 312 U. S. 658, reversing 15 Alt. (2d) 822, 823.

By such a device as this the state could withdraw from the area of public discussion all issues of economic concern to workers and to the public, and, by denying to them an opportunity to become informed of the issues, make it impossible for them to participate in the shaping of their economic destiny. But this device falls far short of the standards required by this Court where limitations are imposed upon freedom of speech.

Limitations upon freedom of speech are permissible, at best, only where the substantive evil to which the speech curtailed may give rise is "extremely serious." *Bridges* v. *California*, 314 U. S. 252. This Court has unequivocally stated time and time again that injury which results to industrial concerns and to nonunion workers as a result of peaceful picketing in labor disputes is not a substantive evil of such magnitude as to warrant prohibition of picketing. See, e. g., *Thornhill*, *Carlson*, *Wohl* and *Swing* cases *supra*. That the picketing enjoined here will give rise to evils of another character than this is not even suggested

by the state. It follows that the ban upon picketing imposed here cannot be permitted to stand.

Conclusion.

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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